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IN THE

Supreme Court of the United States

October Term, 1966

No. .....

WILLIAM RAY CORBEAN (a minor), By WILLIAM CHARLES CORBEAN, His Father and Next Friend,
Petitioner,

vs.

XENIA CITY BOARD OF EDUCATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on September 13, 1966.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court (R. 16a-17a), printed in Appendix B hereto, *infra*, p. 21, is reported in ... F. Supp. .... The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, p. 19, is reported in 366 F. 2d. 480.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Sixth Circuit was entered on September 13, 1966. R. 31a-32a; p. 23, *infra*. The jurisdiction of this Court is involved under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

I.

Whether respondent and courts of Ohio and United States District Court under color of State law, custom or usage, in the sole defense of "governmental immunity", deprived the petitioner of any right, privilege or immunity secured by the Fourteenth Amendment to the Constitution of the United States or any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

II.

Whether Title 28 U. S. Code 1343 (3) is applicable in providing the appropriate remedy for the deprivation, under color of State law, custom or usage, in the sole defense of "governmental immunity", of any right secured by the Fourteenth Amendment to the Constitution of the United States or by any Act of Congress.

III.

Whether the State of Ohio by constitutional and legislation provisions consented that a municipality may sue and be sued, regardless of the doctrine of "governmental immunity".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal statutory provision involved is Title 28 United States Code, Section 1343 (3), known as the Civil Rights and Elective Franchise Act of Congress.

The statutory and constitutional provisions of the State of Ohio involved in this action are Section 715.05 of Ohio Revised Code, known as General Powers of Municipal Corporations, and Sections 16 and 1 of Article I of the Constitution of the State of Ohio. They are all printed in Appendix A, *infra*, p. 17.

STATEMENT

Nature of Case: This action involves the deprivation of rights embraced under the Fourteenth Amendment to the Constitution of the United States and Federal Laws, under color of State law, custom or usage, under the sole defense of "governmental immunity", and where the State of Ohio has provided by its constitution that every person, for an injury done him in his . . . person . . . shall have remedy by due course of law, and legislation that municipalities may "sue and be sued" regardless of such law, custom or usage. The petitioner holds that where the Constitution and Legislature has sanctioned and authorized such suits to be brought, that the State courts thereafter cannot deprive its citizens of this right under the guise of judicial legislation. The State courts by actual demonstration in this case have deprived the petitioner of fundamental rights protected by the Fourteenth Amendment for which Title 28 U. S. C. 1343 (3) was enacted to redress.

The outmoded doctrine of "governmental immunity" projected into this action under color of law, custom or usage, has long been a roadblock to the orderly progress of due process under American Jurisprudence. During the

past decade this repugnant doctrine has been outlawed in many state jurisdictions, and it is now called into question as being repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States and Federal Laws.

Relevant Facts: On September 21, 1962, the petitioner filed his petition in the Court of Common Pleas of Greene County, Ohio, for damages resulting from the loss of the sacred property of one eye as a result of the negligence of the respondent herein while he was attending the Industrial Arts School under the control of Xenia City Board of Education (R. 17a). In due course on November 16, 1962, the respondent filed its demurrer to the Amended Petition in which it asserted the defense of "governmental immunity", and thereafter, on December 1, 1962, the petitioner filed his Second Amended Petition by leave and authority of the Court (R. 18a). Thereafter, on January 10, 1963, the petitioner filed his Motion to Strike the Demurrer, *by which motion an attack was made upon the doctrine of* "governmental immunity" as being repugnant to the Ohio Constitution and the Fourteenth Amendment to the Constitution of the United States (R. 22a).

On January 31, 1963, the State court issued its decision in which it asserted that the demurrer is entirely based upon the doctrine of "governmental immunity" and that any such major change in the common law of Ohio could only be promulgated by legislative authority (R. 25a).

The petitioner herein after duly effecting his appeal to the Court of Appeals of Greene County, on November 9, 1963, that appellant court while "aware of the wealth of literature which protests against governmental immunity for tortious conduct" asserted that any change in the law

of Ohio, must come from its source. On November 9, 1963, the Court of Appeals of Greene County affirmed the decision of the trial court (R. 26a).

In due course the petitioner effected his appeal to the Supreme Court of Ohio, and that court overruled the Motion to Certify on September 23, 1964, on the ground that there was no substantial constitutional question existing. Thereafter, on October 28, 1964, the Supreme Court of the State of Ohio denied the Motion for Rehearing (R. 28a).

The petitioner herein chose not to go directly to the Supreme Court of the United States but to pursue his rights under the special Act of Congress, Title 28 U. S. C. 1343 (3), which was made to specifically protect the rights under the Fourteenth Amendment to the Constitution of the United States. Especially is this action appropriate where there has been a demonstration by actual facts of the deprivation of specific rights under the Fourteenth Amendment. Furthermore, added advantage is gained in behalf of your petitioner to pursue this specific course under the factual circumstances when processes under the State courts have been exhausted by a refusal to accord a recognition of the two major branches of the Fourteenth Amendment, (1) "No State shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States", and (2) The rights embraced in petitioner's behalf under "due process" and "equal protection of the law." This refusal has been demonstrated by all of the courts of the State of Ohio.

On December 9, 1964, the petitioner herein filed his Complaint in the United States District Court for the Southern District of Ohio, Western Division, at Dayton (R. 1a.).

On February 1, 1965, the respondent filed its Motion to Dismiss. Thereafter, on May 14, 1965, the petitioner filed his Amended Complaint, and on the 27th day of May, 1965, the District Court sustained the respondent's Motion to Dismiss (R. 16a). Thereafter, in order to more effectively raise the specific constitutional rights violated, the petitioner presented a motion to file his Second Amended Complaint, which was denied on June 18, 1965 (R. 10a). On June 25, 1965, petitioner filed his Notice of Appeal under Rule 37 (B); and on August 11, 1965, the Stipulated Entry as to Contents of Appendix on Appeal was filed in the United States Court of Appeals for the Sixth Circuit (R. Index and 28a).

Thereafter, in due course, after the filing of the petitioner's Brief, respondent's Brief, petitioner's Reply Brief and Arguments, the United States Court of Appeals for the Sixth Circuit on September 13, 1966, affirmed the decision of the United States District Court.

Within the rule provided petitioner herein applies to the Supreme Court of the United States for a petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below in the instant case is in direct conflict with the decisions of the Third and Ninth Circuit Court of Appeals. Both the Third and Ninth Circuits have applied the Civil Rights Acts to grant relief to plaintiffs who were tortiously injured by representatives of the respective states. The decision in *Basiston v. Weir*, 340 F. 2d 74 (3rd Cir., 1965) by Judge Biggs presents a scholarly discussion of application of Civil Rights Acts. The opinion *York v. Story*, 324 F. 2d 450 (9th

Cir., Calif., 1963) applies Civil Rights Act in action of tortious assault by police officer. Also, the case of *Lucero v. Donovon,* 354 F. 2d 16 (9th Cir., 1965) makes application of Civil Rights Act to facts involving unlawful arrest and search of police officers of females. The parent opinion and forerunner of above opinions, *Marshall v. Sawyer,* 301 F. 2d 639 (9th Cir., 1962) is printed in Appendix C hereto. The Circuit Court of Appeals in *Marshall v. Sawyer,* 301 F. 2d 639, at page 646 held that:

> "The only elements which need to be present in order to establish a claim for damages under the Civil Rights Act are that the conduct complained of was engaged in under color of state law, and that such conduct subjected the plaintiff to the deprivation of rights, privileges, or immunities secured by the Constitution of the United States.
>
> "The defendants' conduct was engaged in under color of state law if they were clothed with the authority of the state and were purporting to act thereunder, whether or not the conduct complained of was authorized or, indeed, even if it was proscribed by state law. Monroe v. Pape, 365 U. S. 167, 187, 81 S. Ct. 473, 5 L. Ed. 2d 492; Screws v. United States, 325 U. S. 91, 111 S. Ct. 1031, 89 L. Ed. 1495. Whether there is 'color' of state law is a federal, not a state question. Where this not true, a state, acting through its legislature or courts, would have it within its power to immunize its agencies and officials from liability under the Civil Rights Act."

The respondent and state courts of Ohio have reacted against the petitioner in such a manner to "immunize its agencies and officials from liability under the Civil Rights Act", just as the Ninth Circuit Court of Appeals had warned against in the case of *Marshall v. Sawyer.*

Furthermore, the Circuit Court of Appeals for the Sixth Circuit paid no attention to the reaction of the Supreme

Court of the Nation in the case of *Baker v. Carr,* when the same Act of Congress was under consideration as in the instant case, 369 U. S. 186, wherein your Court asserted that where the State Courts are unable to grant relief, that such does not bar a Federal Court from assuming jurisdiction to inquiry into deprivation of Federal Constitutional rights.

Furthermore, there is a sporadic list of Circuit and District Courts that have approved of relief against school boards under the Civil Rights Acts of Congress as is asserted in the instant case; these cases are *Westminister School District of Orange County v. Mendez,* CCA Cal. 1947, 161 F. 2d 774; *Evans v. Members of State Board of Education,* D. C. Del., 1956, 145 F. Supp. 873; *Mills v. Board of Education of Anne Arundel County,* D. C. Md., 1939, 30 F. Supp. 245; *Johnson v. Levitt and Sons, Inc.,* D. C. Pa., 1955, 131 F. Supp. 114 and *Browder v. Gayle,* D. C. Ala., 1956 D. C. Ala., 1956 142 F. Supp. 707.

The instant case may be distinguished from the decision in *Monroe v. Pape,* 365 U. S. 167, 191-192, which rested upon the exclusion of the City of Chicago in the use of the word "person" under Title 42 U. S. C., 1983; while the instant case is brought under Title 28 U. S. C. 1343(3), and the Ohio Constitutional authorization for present action, and legislative enactment that municipalities "may sue and be sued."

2. Clearly, the questions presented are of importance in securing and preserving the constitutional rights of the people against the continued invasion by the doctrine of governmental immunity. For more than a decade this Court has been interested as a vigilant guardian of the rights of the people, your decisions manifest such a trend,

and during the same time a nation-wide movement has been on in opposition to this parasitic doctrine of governmental immunity. The law reviews throughout the nation have almost unanimously come out in protest against such doctrine. The Ohio Academy of Trial Lawyers Association has had proposed legislation against governmental immunity on its list, and at the top thereof for first consideration, but legislation has not been forthcoming. While many of the states have outlawed this doctrine by action of their supreme courts, yet Ohio, both by legislature and by court action has refused to take action, and this to the great hurt of the people.

This case is of importance also because all of the courts of Ohio were first given the opportunity to protect the constitutional rights of the petitioner herein and refused to act. Thereafter, the petitioner herein lodged his complaint in the United States District Court for the Southern District of Ohio, at Dayton under Title 28 U. S. C. 1343(3), which Act places no limitation on the time or amount involved wherein to bring action. All of the courts heretofore have refused to recognize the rights of petitioner herein. This Court in the case of *Baker v. Carr*, Tenn. 1962, 369 U. S. 186 has asserted that where state courts were unable to grant relief such does not bar a federal court from assuming jurisdiction to inquiry of deprivation of Federal Constitutional rights.

3. The advancing mechanized age and population explosion call for the ever-increasing necessity to abolish governmental immunity in order to preserve the constitutional rights to the people as outlined in the Fourteenth Amendment to the Constitution of the United States. Modern society has come a long way since the heyday of governmental

immunity when the knight in shining armor traversed the countryside on his steed to the great swiftness of five miles per hour. Today the modern automobile is geared to travel at eighty, ninety and over one hundred miles per hour. The jet machine outstrips the speed of sound; and the astronauts travel in their capsules at the rate of several thousand miles per hour. With the increasing speed of travel brought about by modern mechanization, comes the population explosion, so that today approximately 50,000 people die annually on the highways, and the projections for highway deaths in the year 1975 indicate 100,000 Americans will die annually. Along with this precipitous risk of life and limb the children in route to and in the public schools are faced with increasing hazards. While security and safety are key words to provide for the protection of the school child, yet he should also be protected in the school room and the school house environs.

So great has been the national carnage from modern mechanization that this has now become a national problem in which Congress has taken action. Security and safety are problems in which the Federal Government in recent years is compelled not only to take notice but to provide for stringent legislation. It is time not only for the states but also for the National Government to take action for the preservation of the fundamental rights of the people. The courts cannot stand on precedent, and the do-nothing position must yield to the ever-increasing clamor against legalized immunity for bruising, mayhem and slaughter of the people. In the case of *Molitar v. Kaneland Community* the Supreme Court of Illinois, 163 N.E. 2d 89 (1959) has asserted that the judicial duty is to mould the law to modern ideas of justice in order to prevail over *stare decisis*.

To leave the matter of governmental immunity to be solved by the states leaves the rights of the people as envisioned in the Fourteenth Amendment to the Constitution in jeopardy. The states have a constant battle in trying to secure the rights of the people both in the legislatures and also in the courts. In *Lewis v. County of Genessee,* 121 N.W. 2d 417 (1963), the Supreme Court of Michigan has asserted that the doctrine of *stare decisis* has devolved into a game of basketball between judges and legislators with neither wanting to make a final decision. This Court has asserted in *Baker v. Carr,* Tenn. 1962, 369 U. S. 186 that where the state court's inability to grant such relief does not bar a federal court from assuming jurisdiction to inquire into deprivation of federal constitutional rights. This Court certainly has the power in these days of legalized mayhem, fostered by governmental immunity, to come to the rescue of the people. There is an ever-growing necessity for this Court to take action.

The question might be asked, wherein are the rights of the people violated and placed in jeopardy? There are two branches to the first paragraph of the Fourteenth Amendment which embrace rights involved in this particular case. (1) It is provided that, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." In order to make a determination of such rights from an historical standpoint, the Ninth Amendment to the Constitution provides that, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Furthermore, the Seventh Amendment assures to the people their respective suits at common law, and that such right be augmented by trial

by jury. The whole category of civil right actions gleaned from history are still reposed in the people, and their protection is guaranteed under the Fourteenth Amendment from state encroachment under law or color of law.

The rights of the people evolve from an historial growth. As early as the days of Moses it was asserted "Eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe. If any man strike the eye of his manservant or maidservant, and leave them but one eye, he shall let them go free for the eye which he put out." It will be noted that one who deprived his servant of an eye, must pay the price of letting that manservant go free. But the early law also provided, "And if they set a price upon him, he shall give for his life whatsoever is laid upon him. If he have gored a son, or a daughter, he shall fall under the like sentence." (Almighty God, Exodus 21).

Furthermore, the Battle of Runnymede and Magna Charta, occurring in the month of June, 1215, were political explosions against King John Lackland, who was exercising under sovereign immunity, and which fundamentally provided that no freeman should "be taken, imprisoned or damaged in person or estate, but by the judgment of his peers" or "by law of the land." Furthermore, the Declaration of Independence was a documentary revolt against the tyrannical immunity of the British Sovereign, and in the first paragraph under the Preamble of that memorable document the people are accorded the right "to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall deem most likely to effect their *Safety* and *Happiness.*" (Writer's emphases are in italics.)

Not only did the State of Ohio deprive the petitioner herein of his civil rights, founded and imbedded in history, but the State of Ohio denied him of (2) rights embraced in due process. Not only did the state courts deny him the opportunity of being heard, but the lower federal courts also denied him that privilege. It has been asserted that the fundamental requisite of due process is the *opportunity to be heard* upon such notice and proceedings as are adequate to safeguard the right for which constitutional protection is invoked. *Anderson National Bank v. Luckett,* 321 U. S. 233 (Ky.); *Boone v. Wachovia Bank & Trust Co.,* 163 F. 2d 809 (D.C.); *Burns v. Lovett,* 202 F. 2d 335 (D.C.); *National Labor Relations Board v. Botany Worsted Mills,* 106 F. 2d 263 (D. C.); *Pearson v. Walling,* 138 F. 2d 655 (Ark.); *Ginsberg v. Lindel,* 107 F. 2d 721 (Iowa); and *MacKenna v. Ellis,* 263 F. 2d 35 (Tex.). Furthermore, it has been asserted as federal law, that "due process is a law which hears before it condemns, proceeds upon inquiry, and renders judgment only after trial." *Sexton v. Barry,* 233 F. 2d 220, certiorari denied, 352 U. S. 870.

Furthermore, the petitioner herein, as a result of the initial injury in an attempt to assert his rights, was deprived of his day in court, was denied the opportunity to present witnesses, and was denied to have his full case with all of its evidence, if necessary, reviewed by the gauntlet of successive courts. Furthermore, it has been asserted by this Court that due process is not concerned with technicalities, but with prejudicial infringement of substantial rights.

The fundamental purposes of these Civil Rights Acts, although the one under which this action is brought may differ in specificity, were intended to embrace not only the

rights of property but also the rights of person, and there are strong reasons for such application. In discussion the application of the early section of the Civil Rights Bill quoted in *Monroe v. Pape*, 365 U. S. 167, 171, Mr. Kerr of Indiana asserted, "This section gives to any person who may have been injured in any of his rights, privileges, or immunities of person or property, a civil action for damages against the wrongdoer in the Federal courts." In fact, the security and safety of both property and of individuals was a basic reason for the enactment of the early Ku Klux Act, see *Monroe v. Pape* at page 172. Since the Act under which this petition is brought is without monetary and time limitation it would be ludicrous to say that protection is given to one who asserts his constitutional rights with respect to a five dollar bill, but to deny the rights of the people who are bruised, maimed and the subjects of public slaughter.

4. The doctrine of governmental immunity is without historical basis, outmoded, foreign to American jurisprudence and should be decisively removed by action of this Court. Governmental immunity is an old cow path, the mud and the stench of which have been endured by the American people to their hurt for over a century. It not only was out of accord with the fundamental principles on which this nation was founded, but is outmoded to the traveler who today speeds along the highway of modern law.

This doctrine of governmental immunity has no historical background for its predication, and it has fastened itself as a parasite under the guise of a misnomer upon the people. If there ever was a king favored both by God and by his subjects, it was the ancient King David who sat in Jerusalem upon the throne of Jehovah, the True

God. When David sinned he was not permitted to plead the divine right of kings and thus secure governmental immunity. When he transgressed the Divine Law the angel of Jehovah slaughtered the subjects of King David from Dan to Beersheba,—II Chronicles, Chapter 21. In order to establish the doctrine of governmental immunity upon the people, the kings of England, four centuries ago, pulled the wool over the eyes of the Anglicans under the guise of the Divine Right of Kings. The English kings of the seventeenth century had some reason to keep their family upon the throne when such security depended upon the amount in the family coffer. This reasoning is no basis for the Americans to keep the king upon the throne.

The changing vicissitudes and conditions of Society give direction to the common law which must keep pace with altered conditions. Well did Judge Parker, speaking for the Fourth Circuit Court of Appeals in *Barnes Coal Corp. v. Retails Merchants Assn., et al.*, 128 F. (2d) 845, 848 (1942) have this to say:

> "We think that the rule is to be determined not merely by consideration of the state of common law at the time of the enactment of the Statute *de bonis asportatis* in the reign of Edward III, or even by a consideration of the common law rule at the time of the American Revolution, but in the light of its subsequent development and decisions interpreting it. *It must be remembered in this connection that the common law is not a static, but a dynamic and growing thing. Its rules arise from the application of reason to the changing conditions of society. It inheres in the life of society, not in the decisions interpretating that life, and while decisions are looked to as evidence of the rules, they are not to be construed as limitations on the growth of law, but as landmarks evidencing its development.*" (Emphasis supplied).

In keeping pace with the decisions of this Honorable Court during the past decade, in preserving the rights of the people, may this Honorable Tribunal take jurisdiction of this case and issue the Writ of Certiorari to the Sixth Circuit.

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APPENDIX A

Constitutional and Statutory Provisions Involved

Section 1 of the Fourteenth Amendment to the Constitution of the United States, part applicable, ". . .. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ."

Title 28 U.S.C. 1343(3) Civil Rights and Elective Franchise. The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

Section 715.05 of Ohio Revised Code, known as General Powers of Municipal Corporations Act, the applicable part of which is as follows: "Each municipal corporation is a body politic, and corporate, which shall have perpetual succession, may use a common seal, sue and be sued . . ."

Article I, Sec. 16 of the Constitution of the State of Ohio reads as follows:

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state in such courts and in such manner as they may be provided for by law. (Adopted September 3, 1912)"

Article I, Sec. 1 of the Constitution of the State of Ohio:

> "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life, liberty, acquiring and possessing property, and seeking and obtaining happiness and safety."

APPENDIX B

(Copies of Opinions and Judgments Below)

OPINION OF COMMON PLEAS COURT OF GREENE COUNTY, OHIO

"WEBER, J.

"Rendered this thirty-first day of January 1963.

"This cause is before the Court upon the general demurrer filed by the defendant, The Xenia City Board of Education, to the second amended petition of the plaintiff. The defendant bases its demurrer entirely upon the doctrine of governmental immunity.

"After fully considering the second amended petition and the arguments presented by both counsel in their briefs, it is the opinion of this Court, as both counsel point out, that the law of this State as pronounced in *Board of Education vs. McHenry, Jr.*, 106 OS 357, and *Aldridge vs. the City of Youngstown*, 106 OS 342, gives to the Board of Education the protection of this doctrine. Plaintiff contends, however, that this doctrine of governmental immunity as it applies to public boards of education is an anachronism and should be struck down by this trial court. Although this Court recognizes virtue in the arguments of plaintiff's counsel, it is the opinion of this Court that such a major change in the common law of this State, which has been consistently followed by our Courts and acquiesced in by our Legislature for many years, can only be promulgated by the legislative authority after due consideration is given to all the ramifications such an abrupt change will cause, so that adequate safeguards and protection can be given to all facets of the public and private community involved. (See *9 Ohio State Law Journal, page*

377. Speech delivered by Professor Fred Dewey of University of Cincinnati Law College before the Ohio Common Pleas Judges Association, November 30, 1962, Columbus, Ohio.)

"Thus it is the order of this Court that the demurrer filed by the defendant be sustained and if the plaintiff does not further plead that final judgment be entered in favor of the defendant, to all of which plaintiff excepts.

"Counsel for the defendant shall draw a proper entry effecting this decision, in accordance with Rule 15 of this Court."

Rendered by Court of Appeals, Greene County, Ohio, November 8, 1963

"BY THE COURT:

"This is an appeal on questions of law from a judgment of the Court of Common Pleas of Greene County, Ohio.

"The plaintiff filed a second amended petition praying for damages for personal injuries sustained while a student in the Industrial Arts Shop in Xenia High School which it is alleged were due to the negligence of the defendant board of education.

"The defendant demurred to the plaintiff's pleading for failure to state a cause of action on the ground that a board of education is an agency of the state and thereby immuned from liability for negligence.

"The trial court sustained the demurrer, and the plaintiff, not desiring to plead further, judgment was entered for the defendant.

"The sole question of law presented in this appeal is whether the Xenia City Board of Education is suable in tort for negligence, and the latest expression of the Su-

preme Court of Ohio answers the question negatively. *Board of Education v. McHenry,* 106 Ohio St., 357. See also, *Finch v. Board of Education,* 30 Ohio St., 37; *Board of Education v. Volk,* 72 Ohio St., 469; *Conrad v. Board of Education,* 20 Ohio App., 317; *Elias v. Norton,* 53 Ohio App., 38; *Shaw v. Board of Education,* 17 Ohio Law Abs., 588.

"In this case, the plaintiff-appellant has ably attacked the doctrine of governmental immunity and cites numerous reputable authorities from other states to sustain his position. We are also aware of the wealth of literature which protests against governmental immunity for tortious conduct. See *Hack v. Salem,* 174 Ohio St., 383-399.

"But any change in the law of Ohio must come from its source.

"The judgment will be affirmed.

"KERNS, P. J., SHERER and CRAWFORD, JJ., concur."

ORDER OF SUPREME COURT OF OHIO
Entered September 23, 1964

"Motion for an Order Directing The Court of Appeals for Greene County to Certify its Record.

"It is ordered by the Court that this motion is overruled."

ORDER OF SUPREME COURT OF OHIO
October 28, 1964

"It is ordered by the Court that rehearing in this case is denied."

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, AT DAYTON

Filed May 27, 1965

"This matter is before the Court upon motion of defendant, Xenia City Board of Education, to dismiss.

"Plaintiff alleges in his Amended Complaint that jurisdiction is founded on the existence of federal question, amount in controversy and Section 1343 (3) of Title 28 U.S.C. known as the Civil Rights and Elective Franchise Act. That part of the Civil Rights and Elective Franchise Act relied upon by plaintiff provides:

> 'The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> '(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or all persons within the jurisdiction of the United States.'

"Plaintiff filed, in the Common Pleas Court of Greene County, Ohio, an action against defendant for personal injury allegedly received because of defendant's negligence. Defendant demurred, alleging the doctrine of governmental immunity; the Common Pleas Court sustained the demurrer. The Court of Appeals of Greene County sustained the lower court; the appeal to the Supreme Court of Ohio was dismissed for the reason that no substantial constitutional question existed. No appeal was sought to the United States Supreme Court.

"Plaintiff contends that.

'The State of Ohio has deprived plaintiff herein of his right of action for the recovery of damages which resulted from the loss of a sacred property of one eye under color of the custom or usage of the doctrine of "governmental immunity" and under various State Constitutional Regulations and laws which are applied and construed against the plaintiff herein so as to render all of said provisions unconstitutional and at variance to the Fourteenth Amendment to the Constitution of the United States.'

"This Court cannot say that the State of Ohio has violated any of plaintiff's constitutional rights because it applied the doctrine of governmental immunity to plaintiff's case. There is no federal question involved. Nor can this Court find jurisdiction under the above quoted Civil Rights Statute. Accordingly, the defendant's motion to dismiss is SUSTAINED.

"/s/ CARL A. WEINMAN
Chief Judge
U. S. District Court"

No. 16739

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WILLIAM RAY CORBEAN, a minor, by WILLIAM CHARLES CORBEAN, his father and next friend,
Plaintiff-Appellant,

vs.

XENIA CITY BOARD OF EDUCATION,
Defendant-Appellee.

APPEAL FROM THE U. S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Decided September 13, 1966

Before O'Sullivan and Celebrezze, Circuit Judges, and Cecil, Senior Circuit Judge.

PER CURIAM. Claiming that while attending a public school under the control of defendant-appellee, Xenia City Board of Education, he was injured through negligence of the school employees, plaintiff-appellant William Ray Corbean, by his next friend, brought suit against the Board for damages in an Ohio Common Pleas Court. Because the operation of the school was a governmental function, the defense of governmental immunity was sustained and the plaintiff's action was dismissed. In the Ohio courts, plaintiff asserted that the enforcement of Ohio governmental immunity doctrine was a deprivation of rights guaranteed

him by the Fourteenth Amendment to the United States Constitution, and offended Ohio's statutes and constitution. The judgment of dismissal was affirmed by the Ohio Court of Appeals and motion to certify was denied by the Supreme Court of Ohio.

The action before us was then commenced in the United States District Court for the Southern District of Ohio, Western Division. Federal jurisdiction was asserted by labeling the action one to redress deprivation of plaintiff-appellant's civil rights. 28 U.S.C.A. 1343(3). The District Judge sustained the Board of Education's motion to dismiss, stating:

> "This Court cannot say that the State of Ohio has violated any of plaintiff's constitutional rights because it applied the doctrine of governmental immunity to plaintiff's case. There is no federal question involved. Nor can this Court find jurisdiction under the above quoted Civil Rights Statute. Accordingly, the defendant's motion to dismiss is SUSTAINED."

It is the law of Ohio that a school board, when discharging a governmental function, is protected from tort liability by the doctrine of sovereign immunity, *Finch v. Board of Education*, 30 Ohio St. 37 (1876); *Board of Education of Cincinnati v. Volk*, 72 Ohio St. 469 (1905), and it applies such rule generally to municipal corporation. *City of Wooster v. Arbenz*, 116 Ohio St. 281 (1927); *Eversol v. City of Columbus*, 169 Ohio St. 208 (1959). The decisions of the Ohio Courts in this litigation reaffirmed adherence to the doctrine of sovereign immunity, and found it applicable here. We follow Ohio law in this tort action unless such Ohio law offends federal law or the United States Constitution. *Erie R. R. Co. v. Tompkins*, 304 U. S. 64 (1938); *Williams v. Kaiser*, 323 U. S. 471

(1945); *Madden v. Commonwealth of Kentucky*, 309 U. S. 83 (1940). We have held that Ohio's doctrine of sovereign immunity has not been abrogated by the Civil Rights Acts. *Cuiksa v. City of Mansfield*, 250 F. (2) 700, 703 (CA 6, 1957).

Appellant urges that we here apply the rule of those states which have case out the sovereign immunity doctrine. It will be for Ohio to determine whether it desires to do so.

Judgment affirmed.

APPENDIX C

JOHN MARSHALL,

Appellant,

vs.

GRANT SAWYER, as Governor of the State of Nevada, et al.,

Appellees.

No. 17322

United States Court of Appeals
Ninth Circuit
March 7, 1962

Hamley, Circuit Judge.

John Marshall, having been assertedly ousted from Desert Inn Hotel in Las Vegas, Nevada, brought this action for damages and injunctive relief, invoking the Civil Rights Act, 28 U.S.C.A. § 1343 (1), (3) and (4), and 42 U.S.C.A. §§ 1983 and 1985(3). Named as defendants were the Governor, Gaming Control Board and Gaming Commission of Nevada, the members of the board and commission, D. I. Operating Co., a Nevada corporation which operates the Desert Inn Hotel and five employees of that company. The action was dismissed on the ground that the federal court should abstain and remit plaintiff to his state court remedies. Plaintiff appeals.

It is alleged in the complaint, among other things, that the defendant state agencies and officials entered into an agreement and adopted a policy to discriminate against and to bar plaintiff from registering or obtaining food service, sitting in the lounge or foyer, or being in the casino or on the premises of any hotel in Nevada licensed to operate a gambling casino, and to bar him from the

state of Nevada as a person designated by them as "undesirable." It was part of this agreement and policy, plaintiff alleged, that the described objectives would be accomplished by coercion, intimidation and inducement by the state defendants, taking the form of threats against hotels in Nevada that they would lose their casino licenses if appellant were permitted in these hotels.

In order to effectuate this agreement and policy, plaintiff alleged, defendants engaged in the following acts:

1. The board and commission and their members compiled, promulgated, published and issued an 8" x 10" booklet bound in black, commonly designated as the "black book," containing the names and pictures of persons, including plaintiff, designated as and deemed, "undesirable" by those defendants, all of this being done without notice or hearing to the persons so designated, including plaintiff;

2. The board and commission and their members on or about March 29, 1960, distributed copies of the black book to hotel operators in the state of Nevada accompanied by a letter over the signature of defendant Abbaticchio, chairman of defendant board, reading in part as follows:

"The attached booklet which will be revised and expanded periodically, contains descriptive data with photographs concerning 11 persons (here they are listed, including appellant).

"In order to avoid the possibility of license revocation for 'unsuitable manner of operation' your immediate cooperation is requested in preventing the presence in any licensed establishment of all 'persons of notorious or unsavory reputation' including the above individuals as well as those who subsequently may be added to this list."

3. The board and commission and their members, per-

sonally or through their representatives, orally informed the recipients of the black book and letter that unless the recipients acceded to the "request" of those defendants, as outlined in the letter, the recipients would lose their licenses;

4. On the evening of October 28, 1960, while plaintiff was sitting in the lounge of the Desert Inn Hotel, not committing or having committed any public offense, Abbaticchio and other representatives of the board and commission, for the purpose of effectuating the described agreement and policy, requested and induced employees of the hotel, defendants herein, to oust plaintiff from the hotel;

5. Acceding to the above-described request and inducement, the five defendants who are employees of the defendant hotel operaitng company, ousted plaintiff from the hotel premises under threat of physical force, this being accomplished in the presence of a large number of persons;

6. In order to harass and intimidate hotel operators into ousting plaintiff from the Desert Inn Hotel and other hotels in Las Vegas, the board and commission and members thereof, led by Abbaticchio, on the evening of October 28, 1960, and other evenings, confiscated cards and dice in the casinos of various hotels in Las Vegas, including the Desert Inn Hotel, while games were in progress and in full view of public patrons such action being extremely detrimental to the gambling business of these hotels, as the state defendants well know and intended;

7. On or about October 29, 1960, Abbaticchio, having in mind the ouster of plaintiff from the Desert Inn Hotel on the previous evening, publicly stated:

"There has been some failure of certain Strip operators to abide by an agreement with the control board not to

entertain or provide or furnish facilities or cater to those people we consider undesirable and detrimental to the gaming industry because of their association with the underworld.

• • • • • • • •

"We are attempting to get them (the reneging Strip operators) to cooperate with the control board."

(4) the complaint shows on its face that each such defendant is protected by the defense of official immunity, and (5) the federal district court lacks jurisdiction.

[1] Accompanying the motion to dismiss was the affidavit of defendant Abbaticchio, chairman of defendant board, in which facts were alleged concerning the preparation and issuance of the so-called black book and accompanying letter, and the policies and enforcement methods of that state agency with reference to the regulation of gambling in Nevada. While this affidavit presented matters outside the pleading, it was apparently regarded by the court as directed only to the motion for a temporary injunction, and such new matters were excluded from consideration in passing on the motion to dismiss. The court therefore did not treat the motion as one for a summary judgment, as it would have been obliged to do had the new matters not been excluded from consideration. See Rule 12(b) supra.

As before noted, the motion to dismiss was granted on the sole ground that the district court should abstain. While the non-state defendants had not moved to dismiss the complaint the court also dismissed the complaint as to them. Having held abstention appropriate as to the state defendants, the court determined that the alleged actions of the state and non-state defendants were so intertwined

that it would be "ludicrous" to retain the case as to some of the defendants and not as to the others. The non-state defendants have not appeared as appellees in this court.

[2, 3] At the outset we must consider, on our own motion, whether the appeal must be dismissed because not taken from an appealable order. An order which dismisses a complaint without expressly dismissing the action is not, except under special circumstances, an appealable order. Javor v. Brown, 9 Cir., 226 F.2d 60.

The special circumstances which will permit this court to regard such an order as final and appealable must be such as to make it clear that the court determined that the action could not be saved by any amendment of the complaint which the plaintiff could reasonably be expected to make, thereby entitling plaintiff to assume that he had no choice but to stand on his complaint. Asher v. Ruppa, 7 Cir., 173 F.2d 10. See also Arthur v. J. J. Newberry Co., Inc., 9 Cir., 239 F.2d 170; Williams v. Peters, 9 Cir., 233 F.2d 618, 16 Alaska 310.

[4] We think such circumstances are present in this case. The order dismissing the complaint herein is not based upon the ground that appellant has failed to state a claim but on the ground that, whether or not a claim has been stated, the federal court should abstain. In view of this ruling there was no way in which plaintiff could, by amending his complaint, avoid dismissal of the action. Faced with this barrier to further district court proceedings, plaintiff's appeal evidences a determination to stand on his complaint and accept the order as a dismissal of the action. We conclude that the order is appealable.

[5] Another preliminary question, going to the jurisdiction of the district court to enter the order under re-

view, must also be considered. This question is whether, by reason of the prayer for an injunction restraining and enjoining state officials in certain respects, a single district judge, as distinguished from a three-judge court convened under 28 U.S.C.A. §§ 2281, 2284, had jurisdiction to dismiss the action on the ground of abstention.[1]

8. On or about November 2, 1960, defendant Sawyer, Governor of Nevada, having in mind what had occurred at the Desert Inn Hotel on the evening of October 28, 1960, publicly stated:

"I agree with any measurse necessary to keep the hoodlums out of Nevada. The operators have a great responsibility to cooperate.

"We might as well serve notice on underworld characters right now they are not welcome in Nevada and we aren't going to have them here."

Plaintiff sought damages in the amount of $100 from each of the state defendants and in the amount of $150,000 from all of the remaining defendants. The injunction which he sought was one which would restrain and enjoin the state defendants, their agents, employees or anyone acting in concert with them or in their behalf:

"from giving effect to said policy and action of keeping plaintiff out of the State of, and hotels in, Nevada through said Black Book or said letter of March 29, 1960, and from causing, coercing or inducing the operators or employees of hotels in Nevada, by threat of cancellation of license or otherwise, to bar or eject plaintiff from their premises, or to refuse to give service or afford accommodations to plaintiff on the same basis as any other citizen;"

Filed with the complaint was a motion for a preliminary injunction seeking temporary relief of the same kind as

that sought in the prayer for a permanent injunction. Defendant D. I. Operating Co., and the five individual defendants who are employees of that company, joined in an answer denying most of the essential allegations of the complaint. The state defendants filed no answer but joined in a motion under Rule 12(b), Federal Rules of Civil Procedure, 28 U.S.C.A., to dismiss the complaint, five grounds being urged, namely: (1) the federal courts should abstain, (2) no grounds for equitable relief were alleged, (3) the complaint did not state a claim upon which relief can be granted,

This question was not discussed in plaintiff's opening brief on appeal. In the brief filed by the state defendants, it was argued that § 2281 is inapplicable. Plaintiff took the same position in its reply brief. When the question was raised from the bench during oral argument, plaintiff and the state defendants adhered to this position.

Plaintiff, however, filed a post-oral argument memorandum in which a change of view was indicated. It was plaintiff's new position that the case was one for a three-judge court, and if the complaint states a cause of action, the judgment of dismissal should be reversed and the cause remanded for the convening of such a court. Appellees filed an answering memorandum in which they adhered to their previously-stated position that a three-judge court was not required.

[6] Section 2281, requiring a three-judge court, is applicable where the plaintiff seeks to enjoin the enforcement, operation or execution of a state statute, or an administrative order of general application representing considered state policy, on the ground that such statute or order is in violation of the Constitution of the United States. See Hatfield v. Bailleaux, 9 Cir., 290 F.2d 632, 635.

In his complaint, summarized above, plaintiff does not attack the validity of any state statute. Nor does he attack the validity of any numbered regulations adopted by the Nevada Gaming Commission.[2] He does, however, in addition to challenging certain conduct by individual defendants, attack the validity of the black book and the letter of March 29, 1960, which accompanied it, compiled, published, distributed and enforced as alleged. While the attack thereon is not expressly stated to be on constitutional grounds, this is the fair intendment of the complaint, as the appellees concede.[3]

The question, then, is whether this black book and the accompanying letter of March 29, 1960, compiled and distributed for the purposes and enforced in the manner alleged, constitute an administrative order of general application representing considered state policy. If so, the single district judge was, in view of §§ 2281 and 2284, without jurisdiction to dismiss the action on the ground of abstention. Idlewild Bon Voyage Liquor Corporation v. Rohan, 2 Cir., 289 F.2d 426, 429.

This booklet and accompanying letter have some of the attributes of an administrative order of general application. According to the complaint, the booklet represented state policy and was distributed to all hotels in the state which operate gambling casinos. It was not limited in its effect to a particular and contemporaneous transaction, but extended to future activities at hotels all over the state. It was stated in the accompanying letter that the booklet would be "revised and expanded" periodically, and recipients were advised to give effect to the information therein contained in order to avoid the possibility of license revocation.

However, when the content of the booklet and letter are examined, it is seen that they are only informational and advisory releases without any immediate operative effect as administrative orders. The booklet is limited to a recital of the findings made by the state agencies and officials concerning the alleged undesirable character of identified individuals. Insofar as it is described in the complaint, the booklet does not order licensees to do, or refrain from doing, anything. The letter calls attention to the booklet and requests "cooperation" in excluding the identified individuals from their establishments. Neither the booklet nor the letter were promulgated in the manner prescribed by statute for administrative orders of general application. See N.R.S. § 463.145, 150.

[7, 8] Section 2281 is to be closely construed to the end that only those cases which plainly fall in the class therein described be referred to three-judge courts. Phillips v. United States, 312 U.S. 246, 251, 61 S.Ct. 480, 85 L.Ed. 800. An agency determination which is primarily a finding of fact, is not the kind of an order contemplated by § 2281. Ex Parte Williams, 277 U.S. 267, 48 S.Ct. 523, 72 L.Ed. 877.[4]

We hold that the agency action sought to be enjoined in this case does not draw into question the validity of a state regulation or administrative order of the kind referred to in § 2281, and that it was not necessary to convene a three-judge court. The single district judge thus had jurisdiction to entertain the suit.

[9] This brings us to the question of whether the court erred in dismissing the action on the ground that the federal court should abstain.

[10] The avoidance of the obligation of federal courts to decide cases in which they have jurisdiction can be

justified under the doctrine of abstention "only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-189, 79 S.Ct. 1060, 3 L.Ed. 2d 1163.

The exposing to state construction or limiting interpretation of state statutes fairly open to interpretation, before federal courts are asked to decide upon their constitutionality, has been held to be an important countervailing interest which would be clearly served by abstention. Harrison v. N. A. A. C. P., 360 U.S. 167, 176, 79 S.Ct. 1025, 3 L.Ed.2d 1152. This is true, the court held, because (1) the state courts might give the state statute a construction which would avoid in whole or in part the necessity for federal constitutional adjudication, and (2) if the state adjudication did not moot the federal constitutional adjudication, the federal judgment would at least "be based on something that is a complete product of the State, the enactment as phrased by its legislature and as construed by its highest court; * * *" Harrison, at 178, 79 S.Ct. at 1031.

No such countervailing interest could be served by abstention in the instant case, since the constitutionality of a state statute is not here in issue.

What is here in question is the asserted illegality of the conduct of the state and non-state defendants, rather than the validity of the statutes and general regulations under which they may have acted. It is nevertheless true that, were an injunction the only relief sought, abstention would serve the same countervailing interest as in the case of a challenge to the validity of a state statute. A state court might well determine that the conduct complained of was

unauthorized by state law and should therefore be enjoined on that ground, without reaching the federal constitutional question.

[11] But in this Civil Rights Act case plaintiff seeks damages as well as injunctive relief. The only elements which need to be present in order to establish a claim for damages under the Civil Rights Act are that the conduct complained of was engaged in under color of state law, and that such conduct subjected the plaintiff to the deprivation of rights, privileges, or immunities secured by the Constitution of the United States.

[12, 13] The defendants' conduct was engaged in under color of state law if they were clothed with the authority of the state and were purporting to act thereunder, whether or not the conduct complained of was authorized or, indeed, even if it was proscribed by state law. Monroe v. Pape, 365 U.S. 167, 187, 81 S.Ct. 473, 5 L.Ed.2d 492; Screws v. United States, 325 U.S. 91, 111, 65 S.Ct. 1031, 89 L.Ed. 1495. Whethere there is "color" of state law is a federal, not a state question. Were this not true a state, acting through its legislature or courts, would have it within its power to immunize its agencies and officials from liability under the Civil Rights Act.[5]

The second essential element in a Civil Rights Act damage case—conduct which deprives the plaintiff of a constitutional right—is also a question of federal law. The meaning or validity of state statutes or regulations is immaterial to the resolution of this question.

[14] The abstention doctrine does not permit federal district courts to defer to the state courts for the decision of federal constitutional questions. United States v. Livingston, D.C., 179 F.Supp. 9, 12, affirmed per curiam Living-

ston v. United States, 364 U.S. 281, 80 S.Ct. 1611, 4 L.Ed.2d 1719.

It has not been argued that the determination of these federal questions could be avoided by requiring plaintiff to seek damages in the state court on some theory other than the Civil Rights Act. But, in any event,, it was held in Monroe v. Pape, 365 U.S. 167, 183, 81 S.Ct. 473, that the federal remedy provided by the Civil Rights Act is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. "It is no answer," the Supreme Court said, "that the State has a law which if enforced would give relief." See, also, Cohen v. Norris, 9 Cir., 300 F.2d 24.

It follows, from what has been said concerning the damage aspect of this case that abstention could not result in mooting the federal constitutional question concerning the conduct of defendants. Nor would any state court ruling concerning the authority to engage in that conduct be of any assistance to the federal court in deciding the constitutional question. This being the case, abstention would not serve an important countervailing interest. See Public Utilities Commission of Ohio v. United Fuel Gas Co., 317 U.S. 456, 463, 63 S.Ct. 369, 87 L.Ed. 396.[6]

[15] We have not overlooked appellees' argument that the damages sought from the eleven state defendants—$100 from each of them—is nominal, and that the principal relief sought is injunctive.

We need not decide whether the $100 sought from each state defendant, if standing alone, should be regarded as a nominal amount. If plaintiff prevails on his damage claim against all of the state defendants, he could recover as much as $1,100. This is a substantial sum. Moreover, while

the injunction was sought only against the state defendants, the monetary recovery in the sum of $150,000 sought against all of the remaining defendants cannot be disregarded. Viewing the case as a whole there is no basis for concluding that only nominal damages are sought, or that the principal relief sought is an injunction.

In view of what is said above, it is unnecessary for us to consider whether, if abstention were available here, it was proper to dismiss the action rather than to retain jurisdiction under a stay pending determination of state law questions in state court proceedings, as was required to be done in Harrison v. N. A. A. C. P., supra.

[16, 17] Appellees argue, as an additional ground of affirmance, that the complaint does not state a claim upon which relief can be granted. While this was one ground of the motion, it was not a ground relied upon by the district court in dismissing the action.

A complaint is not subject to dismissal upon this ground unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80; Gruen Watch Co. v. Artists Alliance, 9 Cir., 191 F.2d 700. We are of the view that, except for the question of whether the complaint adequately alleges that the non-state defendants acted under color of state law, the complaint is sufficient to withstand a motion to dismiss made on the indicated ground. Upon remand the parties will have an opportunity to test the adequacy of the complaint in the respect here reserved, and plaintiff will have the opportunity to amend the complaint in that respect.

The judgment is reversed and the cause is remanded for further proceedings consistent with this opinion.

Footnotes

1. § 2281 reads as follows:

"Injunction against enforcement of State statute; three-judge court required "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968."

The first paragraph of 28 U.S.C.A. § 2284 (5) reads as follows:

"Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing."

2. Regulation 5.010(3) (e), promulgated by that agency, which is not mentioned in the complaint, reads as follows:

"(3). The commission and the board deem that any activity on the part of a licensee, his agents or employees which is inimicable to the public health, safety, morals, good order and general welfare of the people of the State of Nevada or which would reflect or tend to reflect discredit upon the State of Nevada or the gaming industry is an unsuitable manner of operation. Without limiting the generality of the foregoing, the following acts or omissions may be deemed unsuitable manners of operation;

* * * * * * * *

"(e) Catering to, assisting, employing or associating with, either socially or in business affairs, persons of notorious or unsavory reputation or who have extensive police records, or persons who have defied congressional investigative committees or other officially constituted bodies acting on behalf of the United States or any state, or persons who are associated with or support subversive movements."

3. In addition to the allegations of the complaint summarized above, there is quoted in the complaint portions of 28 U.S.C.A., § 1343, in which reference is made to the rights, privileges and immunities secured by the Constitution of the United States.

4. See also, Gully v. Interstate Natural Gas Co., 292 U.S. 16, 54 S.Ct. 565, 78 L.Ed. 1088; Martin v. Producers Pipeline Co., 6 Cir., 113 F.2d 817.

5. The federal character of such a question was exemplified recently in Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45. The Supreme Court of the United States overturned a ruling by the Supreme Court of Delaware that the conduct engaged in by a particular restaurant did not constitute state action.

6. The district court did not order, and appellees have not suggested, that the case be split, the injunctive feature being dismissed or postponed awaiting a state court adjudication, and the federal court proceeding with the damage feature of the case.

NT

IN THE

Supreme Court of the United States

October Term, 1966

No. 847

WILLIAM RAY CORBEAN (a minor, By WILLIAM CHARLES CORBEAN, His Father and Next Friend,
Petitioner,

vs.

XENIA CITY BOARD OF EDUCATION,
Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner,

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XENIA CITY BOARD OF EDUCATION,
Respondent.

MOTION

Comes now the petitioner herein and asks leave to docket and file his Supplement to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. All opposing counsel of record have been served with typewritten copy of said supplement in ample time to respond to the contents of the within supplement in their Brief. The contents of said Supplement are material and vital to the issues involved in this action before the Honorable Court.

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Attorney for Petitioner.

SUPPLEMENTARY MATTER FOR WRIT OF CERTIORARI

Since there are additional matters to be brought to the attorneys representing the respondent, and there may not be sufficient time to run this off on the press, the following is initially hastened and brought to the attention of those preparing the opposing brief. Opposing counsel may wish to comment upon these additional matters in their forthcoming brief.

You will note on page 6 of the Petition that there are four major cases coming from the Third and Ninth Circuit Court of Appeals which the writer holds are in conflict with the opinion of the Sixth Circuit in the instant case. In all of these cases there is a strong current relied upon by the successful parties in these cases from the Third and Ninth Circuits which emphasizes the "right of privacy". This right of privacy is additionally relied upon by the petitioner herein to all of the other rights, privileges or immunities embraced in both protective branches of the Fourteenth Amendment to the Constitution of the United States.

It will be noted in the case of *Basista v. Weir*, 340 F. 2d 74 that the police officer invaded the home of the complainant and was struck in the back of the head without provocation. This undoubtedly is an invasion of the right of privacy, and the "right to be undisturbed" as emphasized in the *Basista* opinion.

On page 81 of the *Basista* opinion Judge Biggs asserts the following:

> "The Civil Rights Act is not to be interpreted narrowly. *Valle v. Stengel*, 176 F. 2d 697, 702 (3rd Cir. 1949). In *Hague v. C.I.O.*, 101 F. 2d 774, 789 (3rd Cir.),

> modified, 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (1939), we said 'such an action sounds in tort.' In *Picking v. Pennsylvania R. Co., supra,* 151 F. 2d at 249 we stated, 'We are compelled to the conclusion that Congress gave a right of action sounding in tort to every individual whose federal rights were trespassed upon by any officer acting under pretense of state law.' In *Monroe v. Pape, supra,* 375 U. S. at 187, 81 S. Ct. at 484, it was said that 'Section 1979 (42 U.S.C.A., Sect. 1983) should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.' "

In the Corbean Case, at hand, it is no answer to say that the injury was caused by and precipitated by the altercation of two colored boys in the school room. The answer to this is that the respondent had the obligation to keep order in the school room, and this the respondent neglected to do. In the recent opinion of *Commercial Union Ins. Co. v. Gonzales Rivera,* 358 F. 2d 480 (1st Cir., 1966) it was held that,

> "A person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done."

In the case of *York v. Story,* 324 F. 2d 450 (9th Cir. Calif.) mentioned at the bottom of page 6 of the Petition, certainly there was an invasion of the right of privacy when the police officer tortiously compelled the complainant to undress and took photographs of the injured party in the nude.

Furthermore, in the case of *Lucero v. Donovan,* 354 F. 2d 16 (1963, 9th Cir.) there was an invasion of the right of privacy when the police officers entered the bathroom of Irene Lucero's home where she was tending her children,

without warrant, and when she vehemently protested, she was handcuffed and taken to jail. The reviewing court said,

> "If the search and seizure at her apartment were unlawful, liability could follow, as against Conrad, for the entire chain of events, which, in continuous and unbroken sequence, followed his unlawful act." p. 20.

Certainly, in this expanding and intensified age of population congestion wherein the right of privacy is paramount to the students in our schools and the workers under governmental supervision, all such need the protection and application of the Civil Rights Act.

Two copies of this Supplement are being sent to both attorneys of record and to the Office of the Attorney General of the State of Ohio.

CONCLUSION

WHEREFORE, for the reasons stated in the Petition for Writ of Certiorari and this Supplement, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

VICTOR F. SCHMIDT,
Counsel for Petitioner.

January, 1967.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 847

WILLIAM RAY CORBEAN (a minor), by WILLIAM CHARLES CORBEAN, His Father and Next Friend,
Petitioner,

vs.

XENIA CITY BOARD OF EDUCATION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CONSTITUTIONAL QUESTIONS INVOLVED

I.

Whether Title 42 United States Code, Section 1983, known as Civil Action for Deprivation of Rights Act, and Title 28, United States Code Section 1343 (3), known as Civil Rights and Election Franchise Act grant the federal courts jurisdiction in this case because of an infringement of federal constitutional rights by the application of the governmental immunity doctrine in Ohio.

II.

Whether statutory and constitutional provisions of the State of Ohio providing that a board of education may sue and be sued are violated by the doctrine of governmental immunity.

ARGUMENTS

I. Title, 42, United States Code, 1983, reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

This Section was enacted by Congress in 1871 in recognition of the need to implement the Fourteenth Amendment of the Constitution so as to protect the civil rights of the Negro citizens of the United States. A review of the legislative history of this act and the conditions which gave rise to its passage are found in the opinion of Mr. Justice Douglas in *Monroe v. Pape*, 81 S. Ct. 473, 365 U. S. 167, 5 L. Ed. 2nd 492. Section 1343 of Title 28, United States Code, passed in 1948, was intended to implement Section 1983.

The federal courts have consistently held that school districts, municipal corporations and similar political subdivisions of a state are not "persons" within the meaning of Section 1983. *Monroe v. Pape, supra; Egan v. City of Aurora*, 81 S. Ct. 684, 365 U. S. 514, 5 L. Ed. 2d 741, on remand 291 F. 2d 706; *Harvey v. Sadler*, 331 Fed. 2nd 387; *Sires v. Cole*, 320 Fed. 2nd 877; *Spampinato v. M. Breger & Co.*, 270 Fed. 2nd 46, certiorari denied 80 S. Ct. 409, 361 U. S. 944, 4 L. Ed. 2d 363, rehearing denied 80 S. Ct. 597, 361 U. S. 973, 4 L. Ed. 2d 553. The Xenia City Board of Education is not a "person" within the meaning of the Act and the federal courts have no jurisdiction in this case.

Section 1983 of Title 42, United States Code, and Section 1343 (3) of Title 28 United States Code, have not been

instruments for granting federal jurisdiction in cases where recovery has been denied because of governmental immunity. These Civil Rights Statutes were not intended to be used to change such substantive laws of the states. State legislatures and courts are permitted to make and interpret their own laws subject to constitutional safeguards. Substantive laws of all states recognize some tortious acts for which there is no recovery and no right to be heard. Examples of such non-recoverable claims for injuries are those for injuries inflicted by incompetent persons, minors, claims barred by the guest statute, statutes of limitations, statutes of frauds, claims against churches and charitable institutions protected from tort liability and claims in cases involving the governmental immunity doctrine. If the governmental immunity doctrine can be challenged by the Civil Rights Statutes, other substantive local laws can also be attacked under the guise of a civil rights violation and the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, will become meaningless.

The Civil Rights Statutes passed so as to afford every citizen an opportunity to be heard by due process of law and to be treated equally by the courts do not change the local laws of the states so as to equalize justice in all states. The United States Constitution cannot provide such protection. Those states adhering to the governmental immunity doctrine, or the guest statute in automobile negligence cases for another example, are applying the law indiscriminately to all citizens. All citizens are equally allowed or denied a hearing by due process of law. The petitioner in this case has not been subjected to individual or arbitrary exercise of governmental powers. He has been treated as an equal with all citizens of Ohio and he has been denied no constitutional rights.

II. The doctrine of governmental immunity is not violative of any Ohio constitutional or statutory provisions. Article I, Section 16 of the Constitution of Ohio provides as follows:

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state in such courts and in such manner as they may be provided for by law."

The provisions of Article I, Section 16 are not self-executing and in the absence of enabling legislation suits may not be brought against the State of Ohio. *State. ex rel, Williams v. Glander,* 148 O. S. 188; *Raudabaugh v. State of Ohio,* 96 O. S. 513. Although the petitioner cites Section 715.05 of the Ohio Revised Code as a relevant statutory provision in this action, it is submitted that this section deals solely with municipal corporations and is inapplicable. School districts in Ohio are separate and distinct political subdivisions and the Ohio Revised Code in Section 3313.17 holds each school district to be "a body politic and corporate, and, as such, capable of suing and being sued. . . ." Nowhere, however, in the Ohio Revised Code can there be found any legislative enactment authorizing a suit in tort to be brought against a duly constituted board of education acting within its governmental capacity.

The Supreme Court of Ohio and other Ohio Courts have applied the immunity doctrine and have consistently held that school districts and boards of education are public agencies of the State for the sole purpose of administering the State system of public education and are entitled to the same degree of tort immunity with which the State itself is clothed. *Finch v. Board of Education,* 30 O. S. 37; *Elias v. Norton,* 53 O. App. 38; *Shaw v. Board of Education,* 17

O.L.A. 588. This rule of governmental immunity has also been held to apply to municipalities. *City of Wooster v. Arbenz*, 116 O. S. 281; *Eversole v. City of Columbus*, 169 O. S. 205.

The federal courts under the rule of *Erie Railroad Co. v. Tompkins* have followed the local law of Ohio. In the case of *Cuiksa v. City of Mansfield*, 250 Fed. 2nd 700, the court held that the governmental immunity doctrine has not been abrogated by the Civil Rights Statutes, and denied recovery of damages for deprivation of rights and privileges against judges of municipal courts acting under color of a statute or ordinance. The recognition by the federal courts that the States may constitutionally prohibit or regulate suits against themselves or their officers is consistent with the federal courts' recognition of the federal government's own immunity doctrine.

SUMMARY

1. The Xenia City Board of Education is not a "person" within the meaning of the Civil Rights Statutes so as to confer jurisdiction in the federal courts in this case.

2. The Civil Rights Statutes cannot be used to invoke federal jurisdiction so as to deny the State of Ohio its right to regulate or prohibit suits against itself, its agencies or its officers.

3. The Civil Rights Statutes were not intended to repeal the rule of *Erie Railroad Co. v. Tompkins*.

4. The petitioner has not been denied due process or equal protection of the laws by the application of the governmental immunity doctrine.

5. The governmental immunity doctrine as applied in this case does not violate any Ohio constitutional or statutory provisions.

6. Federal courts recognize that the governmental immunity doctrine applies to states as well as to the federal government.

CONCLUSION

No rights of the petitioner under the Fourteenth Amendment of the United States Constitution, Title 42 United States Code, Section 1983, or Title 28 United States Code, Section 1343 (3), the Constitution of Ohio, legislation thereunder or the judicial interpretation thereof, have been violated. The opinions of the District Court for the Southern District of Ohio and the United States Court of Appeals for the Sixth District should be affirmed and this Court should not take jurisdiction of this case and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Constitutional and Statutory Provisions Involved

Constitution of Ohio, Article I, Section 16

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state in such courts and in such manner as they may be provided for by law."

Title 42, United States Code, 1983. Civil action for deprivation of rights

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Title 28, United States Code, 1343. Civil rights and elective franchise

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
>
> (2) To recover damages from any person who fails to

prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivaton, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

Ohio Revised Code, 3313.17 Corporate powers of the board.

"The board of education of each school district shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing, and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district, any grant or devise of land and any donation or bequest of money or other personal property."

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XENIA CITY BOARD OF EDUCATION,
Respondent.

PETITIONER'S REPLY BRIEF

Pursuant to Rule 24(4) the petitioner herewith presents his Reply Brief.

At the very outset on page 1 of the Brief of the respondent it will be noted that it makes a change in the first question presented by including Title 42 U.S.C., Section 1983, known as Civil Action for Deprivation of Rights Act. Granted that the respondent has a right to change questions involved, yet in doing so he improvises an argument in this case which is wholly irrelevant. On page 8 of the Petition it is asserted that, ". . . The instant case is brought under Title 28 U.S.C. 1343(3), and the Ohio

constitutional authorization for present action, and legislative enactment that municipalities 'may sue and be sued'." This action does not present the problem in the use of the word "person" involved in Title 42 U.S.C., Section 1983, and the argument on page 3 of the Brief of respondent is specious and wholly irrelevant.

It will be noted also that the Respondent omits any reference of opposition to the first and second questions of the Petition of any right, privilege or immunity secured by the Fourteenth Amendment to the Constitution of the United States or by any Act of Congress. Again, while the respondent has a right to change the questions involved, and also to leave out any question, yet in doing so where even the argument in response to the Petition does not rebut the existence of a federal right secured by the Fourteenth Amendment to the Constitution of the United States or by any Act of Congress, which is very essential in this case, in all probability the respondent has waived opposition to the existence of such an important question of the federal rights involved.

The quotation of Title 42 U.S.C. 1983 at the top of page 3 of the respondent's Brief is not applicable in this case, and the first two paragraphs of page 3 relative to the application of the word "person" is not applicable, and such was pointed out on page 8 of the Petition for Writ of Certiorari. On page 4 of the respondent's Brief a position is taken that while constitutional safeguards are recognized, yet the states by adhering to the immunity doctrine are protected in "applying the law indiscriminately to all citizens." The position taken by this Court repeatedly is that when the state law infringes a constitutional right

embraced in the Fourteenth Amendment, that such law is unconstitutional irrespective of the doctrine in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, and irrespective of indiscriminate application. Since the respondent does not argue against the federal rights and immunities raised in the Petition, and wholly ignores the second question presented relative to "right, privilege or immunity", then it must be assumed that there is probably a waiver of the existence to such rights.

On page 5 of the Brief of the respondent, the position is taken that Article I, Section 16 of the Constitution of Ohio is not self-executing in the absence of an enabling legislation. In answer to this the petitioner holds that the State of Ohio has let down the bars for suits against a municipality by Section 715.05 of Ohio Revised Code in which it is provided that each municipality may "sue and be sued . . .". Furthermore, since the respondent has relied upon Ohio Revised Code, Section 3313.17 which holds that each school district is "a body politic and corporate, and, as such capable of suing and being sued", that the petitioner accepts such position as applicable to the respondent as letting down the bars and giving consent for the present action, irrespective of what the Courts of Ohio have said in the matter, and especially when federal rights and immunities have been violated. In *Law of Torts* by William L. Prosser (3rd Ed., 1964), page 1002-1003 is found the following language:

> "The immunity has been extended also to various state agencies, such as prisons, hospitals, educational institutions, state fairs, highway authorities, and commissions for public works. There is, however, a decided

> tendency to find a legislative intent in creating the agency, that it shall be subject to liability; and this is quite common in the latter cases, in many of which a provision that the agency can sue and be sued has been held sufficient to indicate it."

Not only does governmental immunity raise a federal question, but in exercising this governmental immunity the rights of the petitioner herein as invisioned by the Fourteenth Amendment have been violated. The case of *Cuiksa v. City of Mansfield*, 250 Fed. 2d 700 does not have application in the instant case, because in the Cuiksa Case the judges of municipal courts were acting under color of the statute or ordinance, and even in that case the Supreme Court of the United States did not give its opinion, and is not determinative of the questions presented by the petitioner. Even if the Cuiksa Case is some authority to the contrary, yet the United States Circuit Court of Appeals for the Third and Ninth Circuits are directly in conflict.

Right here lies a vulnerable defect in respondent's Brief. At no place in respondent's Brief is there any answer or any explanation to the conflict that exists between the opinion of the Sixth Circuit and the four opinions of the Third and Ninth Circuits, as specified on pages 6 and 7 of petitioner's Brief. May we not rely upon the statement, therefore, found in *Supreme Court Practice* by Stern and Gressman (3rd Ed., 1962) 265 wherein it is asserted,

> "Where there is a clear conflict of decisions, or where the question is undoubtedly of such importance as to need a Supreme Court determination, the respondent may have no reasonable basis for opposing certiorari."

It will be noted that the respondent takes his own avenue to present its Brief, but in doing so leaves the reasons for granting the Writ as presented in petitioner's Brief for the most part unanswered, and, therefore, runs contrary to the usual response. Also, in *Supreme Court Practice, supra*, page 264, it is asserted,

> "The Argument in the brief in opposition should answer the arguments contained in the Reasons for Granting the Writ in the petition."

CONCLUSION

For the reasons asserted in petitioner's Petition, Supplement and this Reply Brief, the Writ for Certiorari should issue by this Court.

Respectfully submitted,

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